

ORIGINAL

BEFORE THE

DOCKET FILE COPY ORIGINAL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Amendment of Section 73.202(b))
of the Commission's Rules, Table of Allotments,)
FM Broadcast Stations)
(LLANO, TEXAS))

MM Docket No. 05-154

RM-11222

RECEIVED

JUN 28 2005

Federal Communications Commission
Office of Secretary

To: The Office of the Secretary,
for the Attention of the Assistant Chief, Audio Division, Media Bureau

OPPOSITION TO MOTION TO ACCEPT SUPPLEMENT

Munbilla Broadcasting Properties, Ltd. (*MPBL*), by its communications counsel, hereby opposes the Motion to Accept Supplement jointly filed by Rawhide Radio, LLC, Clear Channel Broadcasting Licenses, Inc., CCB Texas Licenses, L.P., and Capstar TX Limited Partnership (collectively, *CC/R*), whereby *CC/R* seek to file a curative Supplement to their Comments in this proceeding.

I. BACKGROUND

1. *CC/R* filed Counterproposal to the Notice of Proposed Rule Making in the instant proceeding, 20 FCC Rcd 6318, 70 Fed. Reg. 19402 (2005) (the NPRM). The NPRM proposed to allot Channel 297A to Llano, Texas as a fourth local commercial FM service. The NPRM noted that the proposed Llano channel conflicted with (Charles Crawford's) dismissed proposal for Channel 297A at Goldthwaite, Texas in MM Docket No. 01-154, and that Mr. Crawford's Application for Review of the dismissal remains pending. Therefore, the NPRM, citing Auburn, Alabama, et al., 18 FCC Rcd 10333 (MB 2003), cautioned interested parties that the proposed Llano allotment could only be granted subject to the outcome of MM Docket No.

No. of Copies rec'd
List ABCDE

044

01-154. The NPRM also solicited Counterproposals, to be filed by May 12, 2005. On May 3, 2005, Ms. Crawford filed Comments reiterating her intent to apply for a construction permit for Channel 297A at Llano, if allotted. Ms. Crawford further stated her intent, should she be authorized to do so, to construct the authorized facilities.

2. On May 11, 2005, MBPL filed a Counterproposal requesting the allotment of Channel 297A to the community of Goldthwaite, Texas as a first local service. MBPL's Counterproposal noted that MBPL's Goldthwaite Counterproposal, like Ms. Crawford's proposed Llano allotment, would be short-spaced to the proposed substitute Channel 297A at Llano, originally part of a Counterproposal in MM Docket 00-148. Notwithstanding, MBPL noted that its Counterproposal was equally acceptable for rule making, pursuant to Auburn, Alabama et al., supra. And MBPL further noted that, on § 307(b) grounds, its Counterproposal must prevail over the proposed Llano allotment. MBPL stated its intent to apply for a construction permit for Channel 297A at Goldthwaite, if allotted. MBPL further stated its intent, should MBPL be awarded the construction permit, to build the authorized facilities, to place the constructed facilities into broadcast service, and to seek a license to cover.

3. On May 12, a group of entities —Rawhide Radio, LLC, Clear Channel Broadcasting Licenses, Inc., CCB Texas Licenses, L.P., and Capstar TX Limited Partnership (collectively, *CC/R*) — filed Comments in this proceeding. *CC/R* noted that it had just filed a multielement Counterproposal in MB Docket No. 05-112 (Fredericksburg, Texas). *CC/R*'s Comments stated that the proposed Llano allotment was short-spaced to a multielement Counterproposal that *CC/R* had filed in MM Docket No. 00-148, and that the outcome of this (Llano) proceeding should be conditioned on the outcome in MM Docket No. 00-148. *CC/R*

further noted that, on May 9, 2005, it had filed a Counterproposal in MB Docket No. 05-112 (Fredericksburg, Texas) that,"... was identical to the portion of CC/R's original [Counter-] proposal in [MM Docket No. 00-148 (Quanah, Texas)] that remains before the Commission on Application for Review." CC/R claimed that the Llano Petition should be considered a Counterproposal in the Fredericksburg proceeding, because CC/R's Counterproposal was mutually exclusive with both the Fredericksburg and Llano Notices of Proposed Rule Making.

4. On May 24, the Reply Comment deadline in the Fredericksburg proceeding, MBPL filed Reply Comments in that proceeding. MBPL showed that CC/R's Counterproposal in the Fredericksburg docket was both fatally defective and unacceptable for rule making because one element of the Counterproposal impermissibly short-spaced a valid and duly issued Construction Permit held by MBPL.

5. In reaction to MBPL's Reply Comments, CC/R has now filed Motions in both the Fredericksburg and Llano proceedings, seeking to lodge Supplements to its Fredericksburg Counterproposal and its Llano Comments. In its Fredericksburg supplement, CC/R seeks to eliminate the short spacing by modifying the reference point that they themselves proposed for a substitute channel at Llano, Texas. In Llano, CC/R seeks to lodge a Supplement that depends on the curative effects of its proffered Supplement to its Fredericksburg Counterproposal.

II. ARGUMENT

THE COMMISSION MUST DENY CC/R'S MOTION

6. As MBPL shows in an Opposition to the Fredericksburg Motion, the FCC wisely limits such technical amendments to situations in which there are "unforeseen circumstances." Milford, Utah, 19 FCC Rcd 10335 (MB, 2004). See also, Amboy, California, 19 FCC Rcd

12405 (MB, 2004). There are absolutely no unforeseen circumstances in Fredericksburg.... none whatsoever. CC/R had actual knowledge that the application was pending, and CC/R had at least constructive knowledge of both MBPL's application's grant and the relevant protection requirements to that application, both before and after grant. It is thus far too late for CC/R to amend its Fredericksburg Counterproposal. That Counterproposal must be judged based on its technical details as of the Fredericksburg Comment deadline. Judging the Counterproposal as it existed on that day and against the relevant technical requirements, the Counterproposal is fatally defective because it short spaced MBPL's granted Construction Permit and did not include a statement of MBPL's willingness to accommodate the Counterproposal.

7. CC/R's Fredericksburg Motion is the one-legged stool on which the Llano Motion necessarily sits. Because the Commission must deny the Fredericksburg Motion, it must also deny the Llano Motion.

8. The precedent that CC/R's Motion cites is either readily distinguishable, or actually speaks against acceptance of CC/R's Supplement. In Winslow, the FCC accepted a supplement that addressed the issue of how the Petitioner had to protect a Yuma station. Years before, Yuma had pursued, and then apparently abandoned, an upgrade effort. After initially opposing the Petitioner's proposal, the Yuma station withdrew its objection and decided to downgrade.

Counsel to the Petitioner (coincidentally, counsel to Rawhide here) asserted:

... Petitioner could not have submitted [its] Supplement at an earlier stage in the proceeding because the Class C allotment at Yuma restricted the ability to move closer to Sun City West. Petitioner argued that the Commission should not have protected the vacant Class C allotment for nine years. Now[,] due to the licensee's withdrawal of its interest in a Class C station, the Commission does not need to rule on whether to continue to protect the Class C allotment.

Supplement to "Comments and Counterproposal" in MM Docket No. 99-246, filed by Desert West Air Ranchers Corporation, December 23, 1999.¹ Here, CC/R can make *no such* representation. MBPL did *not* abandon and *never once* slacked off in its station-improvement effort. From the very day that MBPL filed application BPH-20030902ADYU through the date of grant, MBPL vigorously prosecuted that application. Upon grant of the resulting Construction Permit, MBPL timely constructed the authorized facility, placed the authorized facility into broadcast service, and applied for a license to cover the authorized facility.

9. In Oakville, the proffered Supplement related to demographic information relevant to the issue of whether a community was worthy of a local service, and there was a question of whether tendered demographic information was in fact accurate. Here, there is no such issue.

10. In Pauls Valley, an application filed to implement a community change adopted in another proceeding (Tatum) turned out to be short-spaced to a Counterproposal (Overton) to the Pauls Valley rule making. The Tatum application was filed after the Pauls Valley Comment deadline. The Bureau stated:

Although the Tatum application was filed after the [Overton] counterproposal herein and thus not entitled to protection against the Overton proposal, it is the Commission's policy to accommodate pending applications whenever possible. In this case, we have identified a non-conflicting transmitter site for the Overton allotment, which according to the staff engineering study, will enable the Overton station to [improve facilities]. Therefore, we believe the public interest would be service by altering the reference coordinates from that proposed in the counterproposal for the Overton allotment.

Id. at para. 8.

¹And notwithstanding acceptance of the Supplement, the Commission required protection of the Class C Yuma allotment and denied the Petitioner's preferred alternative.

11. That was a completely different situation from what we have in Fredericksburg. CC/R's Fredericksburg Counterproposal is not only *not* an application, it is also *not* an application to implement a city-of-license change. The Tatum application was *not* short-spaced to a granted Construction Permit, and it was *not* defective *ab initio*. The Overton Counterproposal itself was substantially complete and technically acceptable on the deadline for Counterproposals in the Pauls Valley proceeding.

12. The Bureau adjusted the Counterproposal reference point to accommodate the *later-filed Tatum application*, in accordance with preexisting policy. Here, by contrast, filing, cut-off, and grant of MBPL's application predated CC/R's Counterproposal by up to twenty months. The preexisting policy mandates the Fredericksburg's Counterproposal's *dismissal*, not the allowing of CC/R to belatedly amend it to rectify a clearly foreseeable defect (its failure to protect MBPL's CP), or to use that amendment as a lever by which the Llano docket is folded into the Fredericksburg docket. CC/R's Counterproposal was Dead On Arrival for failure to protect MBPL's granted CP. No amount of tweaking or cajoling can revive it.

13. CC/R cannot be allowed to circumvent the clear, long-standing requirement that a Counterproposal must be technically acceptable as of the deadline for Counterproposals in the relevant rule-making proceeding. CC's Counterproposal in the Fredericksburg docket was fatally defective as of that critical deadline. That is the end of the story. Otherwise, the threat to the FCC's administrative efficiency and scarce processing resources are simply far too great. Other Counterproponents who toss in half-baked, blatantly, or even latently defective filings would

surely take note. They would invoke the Melody Music doctrine,² and demand similar kid-gloves treatment. The FCC could not deny them their free passes.

14. What CC/R has presented the FCC with in Fredericksburg is a run-of-the-mill situation in which a party has tossed in a defective Counterproposal on the relevant filing deadline, and then belatedly tried to fix its flaws. The Agency — rightly, and many times before — has handled this situation by disallowing the belated attempt to patch the hole in the defective Counterproposal. The same result must obtain in the Fredericksburg docket. And in both the Fredericksburg proceeding and this Llano docket, the FCC must preserve and defend the ordained Comment/Reply Comment cycle and applicable deadlines. The FCC must deny CC/R's Motion to Accept Supplement.

III. CONCLUSION

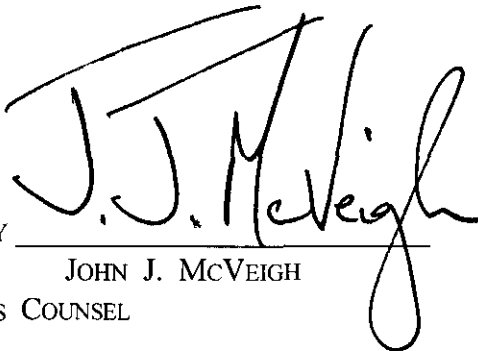
15. For the above reasons, the Commission's staff must promptly deny CC/R's Motion to Accept Supplement.

Respectfully submitted,

MUNBILLA BROADCASTING PROPERTIES, LTD.

JOHN J. McVEIGH, ATTORNEY AT LAW
12101 BLUE PAPER TRAIL
COLUMBIA, MARYLAND 21044-2787
TELEPHONE: 301.596.1655
TELECOPIER: 301.596.1656

BY


JOHN J. McVEIGH
ITS COUNSEL

DATE: JUNE 28, 2005

²Melody Music, Inc. v. FCC, 345 F.2d 730, 7623 (D.C. Cir. 1964).

CERTIFICATE OF SERVICE

I hereby certify that I have, this Twenty-eighth day of June, 2005, sent copies of the foregoing **OPPOSITION TO MOTION TO ACCEPT SUPPLEMENT** by first-class United States mail, postage prepaid, to:

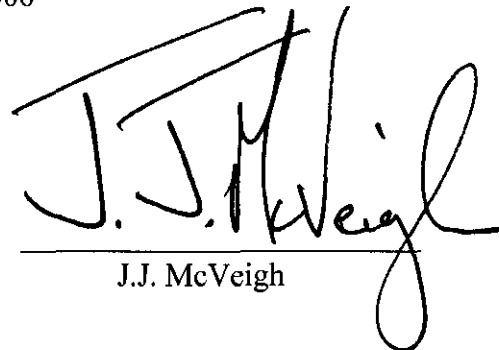
Katherine Pyeatt
6655 Aintree Circle
Dallas, Texas 75214

Linda Crawford
3500 Maple Avenue, Suite 1320
Dallas, Texas 75219

Gene A. Bechtel, Esq.
Law Office of Gene Bechtel
1050 Seventeenth Street, N.W., Suite 600
Washington, D.C. 20036

Mark N. Lipp, Esq.
J. Thomas Nolan, Esq.
Vinson & Elkins, LLP
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Gregory L. Masters, Esq.
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006



J.J. McVeigh